Supreme Court, U.S.
FILED
991968 JUN 5 - 2000

IN THE

SUPREME COURT OF THE UNITED STATES

ARTHUR VANMOOR,

Petitioner

v.

WAL-MART STORES, INC., ET AL.

(further respondents listed on page ii)

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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3600

QUESTIONS PRESENTED FOR REVIEW

An issued patent is presumed valid. Patent invalidity is an affirmative defense to a patent infringement charge.

1. When the defendant in a patent infringement case claims prior use and sale that would invalidate the patent, does the patentee's allegation of current infringement satisfy the defendant's burden of proving that the products that were the subject of the pre-critical date sales anticipated the claimed invention?

2. Is the "ready for patenting" test of *Pfaff v. Wells Electronics, Inc.*, which dealt with an on-sale bar based on the patentee's own acts, applicable to a case in which the defendants claim anticipation based on prior sale and use?

3. Where Section 282 of the Patent Statutes states that each "claim of a patent . . . shall be presumed valid independently of the validity of other claims," can the court summarily declare an entire patent invalid without reviewing specific claims?

Parties

Rule 14(1)(b) Listing

Petitioner

ARTHUR VANMOOR

Respondents

WAL-MART STORES, INC.

BUILDER'S SQUARE, INC.

HOME DEPOT USA, INC.
(doing business as Home Depot)

RED DEVIL, INC.

SONOCO PRODUCTS COMPANY

FEDERAL PACKAGING CORPORATION

THE GLIDDEN COMPANY

TABLE OF CONTENTS

QUESTIONS PRESENTED i
LIST OF ALL PARTIES ii
TABLE OF CONTENTS iii
TABLE OF AUTHORITIES iv
OPINIONS BELOW 1
JURISDICTION 2
STATURORY PROVISIONS INVOLVED 2
STATEMENT 3
A. Background 4
B. Proceedings Below 5
REASONS FOR GRANTING THE PETITION 6
A. The Fact Evidence 7
B. The Fact Evidence Must Not be Disregarded in the Summary Judgment Context When it Contradicts the Defendants' Affidavits of Prior Sale and Use 8
C. The Presumption of Validity Attaches to Each Claim Individually 11
CONCLUSION 13
APPENDIX A 1a
APPENDIX B 10a
APPENDIX C 17a

TABLE OF AUTHORITIES

CASES

American Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350 (Fed. Cir. 1984) 12

Barbed Wire Patent Case, 142 U.S. 275 (1892) 3,12

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 10

Dennison Manufacturing Co. v. Panduit Corp., 475 U.S. 809 (1986) 11

Eibel Process Co. v. Minnesota & Ontario Paper Co., 261 U.S. 45 (1923) 12

Ferag AG v. Quipp Inc., 45 F.3d 1562 (Fed. Cir. 1995) .. 8

Helifix Limited v. Block-Lok, Ltd., 208 F.3d 1339 (Fed. Cir. 2000) 12

Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 9,10

Panduit Corp. v. Dennison Manufacturing Co., 810 F.2d 1561 (Fed. Cir. 1987) 11

Pfaff v. Wells Electronics, Inc., 525 U.S. 55 (1998) 3,6,7

Radio Corp. of America v. Radio Eng'g Labs., Inc., 293 U.S. 1 (1934) 10,12

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944) 10

Stearns v. Beckman Instruments Inc., 737 F.2d 1565 (Fed. Cir. 1984) 12

United States v. United States Gypsum Co., 333 U.S. 364 (1948) 10

Woodland Trust v. Flowertree Nursery Inc., 148 F.3d 1368 (Fed. Cir. 1998) 12

STATUTES/RULES

28 U.S.C. § 1254 (2000) 2
28 U.S.C. § 1295 (2000) 7
28 U.S.C. 1338(a) (2000) 3
35 U.S.C. § 102 (1994 & Supp. 2000) 2,3,4,5,6,7,13
35 U.S.C. § 271 (1994 & Supp. 2000) 3,5
35 U.S.C. § 282 (1994 & Supp. 2000) 2,3,6,10,11,12,13

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WAL-MART STORES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Arthur Vanmoor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 10a-16a) is reported at 201 F.3d 1363. The order of the district court (App., *infra*, 1a-9a) is unreported, but available online at 1998 U.S. Dist. LEXIS 22694.

JURISDICTION

The court of appeals entered its judgment on January 10, 2000 (App., *infra*, 10a), and denied petitioner's petition for rehearing on March 7, 2000 (App., *infra*, 17a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

35 U.S.C. § 102 states, in pertinent part:

> A person shall be entitled to a patent unless-
>
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States . . . .

35 U.S.C. § 102 (1994).

35 U.S.C. § 282 states, in pertinent part:

> A patent shall be presumed valid. Each claim of a patent (whether in independent, dependent, or multiple dependent form) shall be presumed valid independently of the validity of other claims; dependent or multiple dependent claims shall be presumed valid even though dependent upon an invalid claim . . . . The burden of establishing invalidity of a patent or any claim thereof shall rest on the party asserting such invalidity . . . .

35 U.S.C. § 282 (1994 & Supp.2000).

STATEMENT

Petitioner Arthur Vanmoor is the owner of United States Letters Patent No. 5,582,331, issued to him on December 10, 1996 based on an application which claimed an international priority of an application in Holland on September 13, 1994. Vanmoor sued defendants Wal-Mart Stores, et al., for patent infringement under 35 U.S.C. § 271 in the United States District Court for the Southern District of Florida on July 28, 1997. Jurisdiction in the federal district court was based on 28 U.S.C. 1338(a). The district court granted the defendants' motion for summary judgment [App., *infra*, 1a-9a] and declared the patent-in-suit invalid and unenforceable. The Court of Appeals for the Federal Circuit affirmed the grant of summary judgment [App., *infra*, 10a-16a].

This case essentially asks what type of proof should be required to invalidate letters patent properly issued by the United States and thus deals with the procedural value of the statutory presumption of validity under Section 282.

This case involves the evidentiary standards applicable in patent cases where the defendants claim anticipation through prior sale and use. The case requires that *The Barbed Wire Cases*, 142 U.S. 275 (1892) be revisited and the proper standards be outlined by this Court upon which a patent may be declared invalid in a situation where a defendant claims prior sale and use and supports the contention only with the affidavits of interested persons and attempts to corroborate the affidavits with written records which, in fact, disprove the content of the affidavits.

As a subordinate matter, the case involves the interpretation of 35 U.S.C. § 282 and the question when a patent may be declared invalid in its entirety as opposed to declaring only certain claims invalid, and whether the rule of *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55 (1998), which dealt with a patenting bar under Section 102(b) based on the patentee's own acts, can be properly applied to a Section

102(a) anticipation scenario, in which the defendant claims that the patented invention had been used and on sale in this country prior to the patentee's invention.

A. Background

The case deals with caulking cartridges that dispense caulking material at the open spout when the plunger inside the tube is pushed forward, toward the spout. The moving plungers of the prior art cartridges had a diameter which was equal to or greater than the inner diameter of the tubes. This "interference fit" between the plunger and the tube ensured that the caulking material was properly sealed inside the cartridge. The cartridges (prior to 1994) had an afterflow problem, i.e., caulking material continued to drip from the open spout even after the plunger was no longer forced forward. Vanmoor's invention broke with that prior art and introduced an improvement. Instead, Vanmoor proposed a plunger with a backwall that has a smaller diameter which would allow the plunger to release the pressure inside the cartridge when the caulking gun no longer pushed the plunger forward. The Commissioner for Patents issued United States Letters Patent No. 5,532,331 (the '331 patent) to him with several claims directed to the improved cartridge.

After his Dutch application was filed in September 1994, Vanmoor disclosed his invention in late 1994 to various manufacturers, including Sonoco Products Company. Sonoco entered into a confidentiality agreement with Vanmoor after expressing great interest in a "no-afterflow" version of the caulking cartridge. The agreement stipulated that the manufacturers would notify Vanmoor if he disclosed to them information which had already been in their possession. No such notification was ever made, but Vanmoor became aware that soon afterwards most of the industry caulking cartridges became dripless.

B. Proceedings Below

Vanmoor brought suit in federal district court, complaining that several companies had started selling caulking cartridges that incorporated his improvement in violation of 35 U.S.C. § 271. The defendants claimed the affirmative patent infringement defense of anticipation based on prior use and sale under 35 U.S.C. § 102. After an amended complaint added leading manufacturers of the accused products, Sonoco Products Company soon emerged as the lead defendant and introduced evidence which tended to show that the patented invention had been in public use and on sale prior to Vanmoor's invention. The evidence consisted of the affidavits of two Sonoco employees and shareholders together with allegedly corroborating papers, including various company-internal specification sheets and invoices that were dated prior to Vanmoor's invention. The defendants averred that they had not made any changes in their production since 1991, years before Vanmoor's disclosure.

No attention was paid to the fact that the supporting drawings and specification sheets in fact proved that the *claimed* invention was *not* on sale before petitioner's priority date and they differed from the later accused products and the patent claims.

The district court granted summary judgment in favor of the defendants [App., *infra*, 9a], holding that the defendants had met their burden with clear and convincing proof, that no issues of material fact were disputed, and that the patent was invalid as a matter of law.

The district court apparently did not review the specification sheets but simply accepted as fact the general statement of the pleadings according to which defendants had not made any changes and what they are currently doing is exactly the same as it has always been done. The court took for granted that no changes were made. If that averment were

true, of course, most of the claims of the '331 patent would indeed be invalid. If the defendants' evidence is reviewed in its entirety, however, it becomes abundantly clear that the affidavits upon which the defendants rested and upon which summary judgment was granted, are false, because their own specifications sheets prove the opposite.

The Federal Circuit affirmed without reviewing any of the details of the specification sheets. Instead, the appeals court held that the defendants' burden to prove that the cartridges sold by the defendants prior to petitioner's invention date anticipated the '331 patent was satisfied by petitioner's allegation that the currently produced cartridges infringe the '331 patent. *Vanmoor v. Wal-Mart Stores, Inc.*, 201 F.3d 1363 (Fed. Cir. 2000). The appeals court held that the defendants had satisfied the test in *Pfaff v. Wells Electronics, Inc.* for the on-sale bar and that the '331 was invalid under Section 102(b).

REASONS FOR GRANTING THE PETITION

The case is of great importance for patentees. The rule announced below denigrates the statutory presumption of validity of a patent, 35 U.S.C. § 282. The decision below proffers a simple formula for defeating a patent without trial and without proper evidentiary support. A patentee can easily lose his patent to summary judgment, where the infringer (falsely) introduces affidavits of interested persons claiming prior use and sale. The rule, unless reversed by this Court, would enable an infringer to prove a patent invalid based on prior use by simply stating that the current product remains unchanged since prior to the invention date. The defendant would not be required to show that the products made and sold prior to the invention did indeed anticipate the *claimed invention*, because that element now would already have been satisfied at the moment the patentee filed his complaint. In sum, patent claims that were issued by the United States after having been subjected to rigorous examination and

prosecuction before the patent examiner could, according to the rule announced in the case below, defeated and declared invalid on the basis of only general averments and without reviewing any details of the claims.

The decision below was erroneously based on the on-sale bar test announced by this Court in *Pfaff*, which deals with a situation in which the patentee himself disclosed his invention and then waited more than twelve months before he filed a patent application, i.e., the inventor violated the one-year grace period defined in Section 102(b). This "on-sale bar," where an inventor loses his right to patent the invention if he waits too long before he applies for a patent and the rule of *Pfaff* are entirely misplaced in the context at hand. Since the Federal Circuit is the only appeals court in patent cases, 28 U.S.C. § 1295(a)(1), this incorrect and misleading application of the *Pfaff* test may become the rule that will be applied by the district courts in the anticipation context where a patent is invalidated based on acts by others than the inventor under Section 102(a).

A. The Fact Evidence

The '331 patent was held invalid under Section 102(b) as anticipated by pre-invention sales by defendants. The underlying evidence consisted of the affidavits of two Sonoco employees and shareholders, and corroborating papers including technical drawings and specifications. The affidavits and the supporting technical drawings from the pre-critical date show a *larger* diameter for the plungers than the inner diameter of the caulking cartridges. That prior art was described in detail by Vanmoor in the introduction to his patent specification, and he improved upon the prior art by reducing the size of the plunger so as to release the built-up pressure to prevent afterflow. In other words, the improvement for which the '331 patent issued deals with the *opposite* relationship, namely, a smaller diameter for the

plunger than for the cartridge. Claim 1 of the patent is representative:

> the backwall having a diameter less than the inner diameter of the tubular body and defining a substantially contact-free spacing distance between the inner wall surface and a periphery of the backwall such that the backwall moves backwardly away from the forward end of the tubular body when a pressure inside the chamber is greater than a pressure outside the chamber.

U.S. Patent No. 5,582,331 at col. 5-6, claim 1.

This discrepancy between the patent and the repondents' evidence was not taken in consideration; instead, the Federal Circuit held that the anticipation was proved by petitioner himself when he claimed that defendants' cartridges infringed his patent, *Vanmoor* at 1340, and defendants averred that they had not made any changes in the production of the infringing products since 1991 and prior to petitioner's invention. The specifications in fact prove the defendants' other averments wrong and aid Vanmoor's position that changes were indeed made by defendants.

The patent infringement suit brought by petitioner claims that currently produced products infringe most claims of the '331 patent. A product produced according to the pre-critical date drawings and specifications would *not* infringe. The accused products have different specifications than the prior art specifications presented by the defendants and Sonoco's statement that they did not make any changes is false. The affidavits, therefore, are false. Summary judgment cannot be granted, as a matter of law, where such important questions of material fact are in dispute.

B. The Fact Evidence Must Not be Disregarded in the Summary Judgment Context When it Contradicts the Defendants' Affidavits of Prior Sale and Use

The Federal Circuit treats the question as to whether or not a product was on sale prior to a defined critical date as a question of law, *Ferag AG v. Quipp Inc.*, 45 F.3d 1562 (Fed. Cir. 1995), which is reviewed *de novo* on appeal. The underlying fact evidence is reviewed for clear error, id. at 1566. This was not done in the case below, and the appeals court disregarded the underlying specifications in their entirety. Instead, the Federal Circuit accepted, without review, the factual evidence upon which summary judgment was granted. The non-review was predicated on the argument that the petitioner himself satisfied the defendants' burden of proving the fact that the '331 patent was anticipated by the accused cartridges. *Vanmoor*, at 1367. The argument, however, is essentially a boot-strapping argument and is logically erroneous. The factual evidence presented by petitioner repeatedly supports the contention that there must exist a difference between the "prior art" drawings and specifications, on the one hand, and the cartridges as they are currently manufactured. This difference, as a matter of law, prevents a conclusion that summary judgment is warranted.

According to Fed. R. Civ. P. 56(e), the nonmoving party must come forward, in response to a motion for summary judgment which is supported by affidavits and corroborating evidence, with specific facts showing that there exists a genuine issue for trial. *See Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). It necessarily follows that in a situation in which the evidence proffered in support of the summary judgment motion is inherently flawed and is internally inconsistent, however, that requirement is inherently satisfied. The issue of material fact which prevents summary judgment is in this case inherent in the allegedly corroborating evidence.

The drawings and specifications introduced by Sonoco show a cartridge tube with an inner diameter of 1.849 ± 0.007 inches and an outer diameter of the plunger that is greater. The detailed information shows an outer diameter which are substantially greater than the inner diameter of the tube. If the drawings and specifications are reviewed for content, the claimed improvement of the '331 patent is not anticipated because the claims state that the plunger have "a diameter less than the inner diameter of the tubular body." '331 patent, claim 1.

The factual inconsistencies among the affidavits and declarants raise a question of fact, which places grave doubt on the propriety of summary disposition. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Moreover, because this is a patent case, the evidence in the form of affidavits should be taken with utmost suspicion. *See Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944)("In patent cases, questions by affidavit is disfavored . . . . Trial by document is an inadequate substitute for trial with witnesses, who are subject to examination and cross-examination in the presence of the decision-maker." *Id.* at 628).

Section 282 of the Patent Act, *supra*, assigns to each patent issued by the Commissioner for Patents a presumption of validity. That presumption of validity places a burden on one who attacks the patent. *Radio Corp. of America v. Radio Eng'g Labs., Inc.*, 293 U.S. 1 (1934) (stating that "an infringer who assails the validity of a patent fair upon its face bears a heavy burden of persuasion, and fails unless his evidence has more than a dubious preponderance." Id. at 6). According to the decision below, that burden is lifted from the attacker when the patentee complains of an infringement. It is respectfully urged that the affirmation on appeal, which shifted a substantial burden of proof from petitioner to defendants and which held that the underlying evidence could be entirely disregarded, is clearly erroneous. This Court must be "left with a definite and firm conviction that a

mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). At the very least, the evidence is so inconsistent that it prohibits the grant of summary judgment. Fed. R. Civ. P. 56. *See also Matsushita*, 475 U.S. 574 (holding that summary judgment should not have been reversed where court relied on evidence that was irrelevant to the pivotal issue at hand).

If this Court rejects the shortcut proffered by the Federal Circuit below, then the underlying evidence of prior use and sale must be reviewed: As noted above, the evidence does not show the claimed invention. In addition, the already shaky probative value of the defendants' affidavits is further weakened by the fact that despite their assertion that they sold millions of the cartridge/plunger combinations prior to the critical date, they did not produce even a single one of those combinations into evidence. Also, even though the agreement between petitioner and respondent Sonoco stipulated that each party would inform the other if they were already in the possession of certain information, the defendants rely heavily on the affidavits that say they were in the possession of the invention, yet they did not inform respondent of these facts when their dealings were still at arms length. Instead, the defendants rely only on dubious and internally inconsistent (see *supra*) affidavits and supporting materials to cloud the issues. The clear existence of a substantial issue of probative fact makes the case simply not amenable to summary disposition. This contention, of course, is only correct if the new rule announced by the appeals court below – the defendants' burden of proving prior use and sale could be satisfied by the patentee's allegation of infringement – is rejected by this Court.

C. The Presumption of Validity Attaches to Each Claim Individually

The congressional mandate that each claim of a patent be independently valid is outlined in Section 282 (see *supra*).

The courts must not, as a matter of statutory law, disregard the claims and their respective limitations. *See Panduit Corp. v. Dennison Manufacturing Co.*, 810 F.2d 1561 (Fed. Cir. 1987) (on remand from this Court's decision in *Dennison Manufacturing Co. v. Panduit Corp.*, 475 U.S. 809 (1986)).

The Federal Circuit has established a rule in this context, according to which the jurisdiction of the trial court summarily reaches all of the claims at issue, i.e., those claims which the patentee asserts are infringed and those claims which have been specifically attacked as invalid. *See Stearns v. Beckman Instruments, Inc.*, 737 F.2d 1565 (Fed. Cir. 1984) (holding that "when patentee asserts infringement of only claims 8 and 9 and defendant does not counterclaim for invalidity of other claims, invalidity determination applies only to claims 8 and 9, and other patent claims remain presumably valid under 35 U.S.C.S. § 282." *Id.* At 1570). Further, the presumption of validity can be overcome only with clear and convincing evidence. *American Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350 (Fed. Cir. 1984); *Woodland Trust v. Flowertree Nursery Inc.*, 148 F.3d 1368 (Fed. Cir. 1998)(discussing the background of the "clear and convincing" standard and explaining the evolution from the "clear, satisfactory, and beyond a reasonable doubt" standard in *Barbed Wire Patent Case*, 143 U.S. 275 (1892), through the "clear and satisfactory" standard in *Eibel Process Co. v. Minnesota & Ontario Paper Co.*, 261 U.S. 45 (1923), and the discussion in *Radio Corp. of America v. Radio Eng'g Labs., Inc.*, 293 U.S. 1 (1934) which dealt with the burden placed on an infringer who attacks the validity of a patent).

None of the specific features of the claims of the '331 patent were reviewed by the district court or the appeals court. This omission is particularly disturbing in light of the otherwise clear prescription by the Federal Circuit that "[t]he first step of an anticipation analysis is claim construction." *Helifix Limited v. Block-Lok, Ltd.*, 208 F.3d 1339 (Fed. Cir.

2000)(decided after the case at hand by a different panel). The next requirement is a "comparison of the construed claim to the prior art." *Id.* at 1342. Since this is a question of "anticipation" under Section 102(a) and not a question of a loss-of-right on-sale bar under Section 102(b), the omission of these steps is particularly egregious and warrants a reversal.

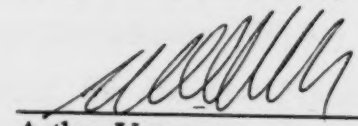
The Federal Circuit's interpretation of Section 282 and the rule followed in the case below, *Vanmoor*, 201 F.3d 1363, affords the district courts a power that violates the letter and the spirit of Section 282, namely a power to sweepingly invalidate a patent without separately and individually invalidating each of the claims.

According to the rule below, a substantial portion of the patent infringer's burden of persuasion to overcome the statutory presumption of validity is carried by the patentee himself who complains that his patent claims are infringed. This Court should grant the instant petition so as to assure that this newly announced standard cannot become the rule of law in patent infringement cases where the patent is attacked as being invalid for anticipation under Section 102.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-6907-CIV-DIMITROULEAS

ARTHUR VANMOOR, formerly known as ARTHUR VANMOERKERKEN,

Plaintiff,

vs.

WAL-MART STORES, INC., et al.,

Defendants.

---/

OMNIBUS ORDER GRANTING FINAL SUMMARY JUDGMENT AND FINAL ORDER OF DISMISSAL

THIS CAUSE is before the Court upon the following motions:

1. Defendant's Motion for Summary Judgment [DE 70];

2. Plaintiff's Motion to Amend Complaint [DE 89]

3. Plaintiff's Motion for Reference [DE 91]

4. Plaintiff's Motion for Delayed Filing of Concise Statement of Facts as to which there is Material Issue to be Tried [DE 96]

5. Plaintiff's Motion to Reschedule Status Conference [DE 101]

6. Plaintiff's Motion for Status Conference [DE 112]; and

7. Plaintiff's Motion to Open Discovery [DE 116].

The Court has carefully considered the motions and is otherwise fully advised in the premises.

I. BACKGROUND

On December 10, 1996, United States Patent No. 5,582,331, entitled Caulking Gun and Cartridge with Afterflow Prevention was issued to the Plaintiff, Arthur Vanmoor, in his former name Arthur Vanmoerkerken. Vanmoor filed the present action against the various defendants alleging they are selling products which infringe upon his patent.

On July 27, 1998, Vanmoor filed his original complaint against the defendants, WalMart Stores, Inc., Builders Square, Inc., Home Depot USA, Inc., and Red Devil, Inc. On October 1, 1997, the Court entered an Order permitting the Glidden Company to intervene as an additional defendant in the present action. On April 24, 1999, Vanmoor filed an Amended Complaint adding the defendants, Federal Packaging Corporation ("Federal") and Sonoco Products Company ("Sonoco"), and asserting an additional claim against these two additional defendants for misappropriation of trade secrets.

The Defendants have filed the present motion for summary judgment asserting the following arguments: (1) the products which allegedly infringe upon Vanmoor's patent were actually on sale and in public use in this country before September 13, 1994, which is one year before Vanmoor's application for the subject patent; and (2) the products at issue were on sale and in use prior to the alleged disclosure of trade secrets by Vanmoor to the defendants, Federal and Sonoco. Vanmoor has responded to the motion for summary judgement essentially asserting that the Defendants have

failed to prove the prior sale and public use of the allegedly infringing products.

Finally, Vanmoor has also filed a motion to amend to add a count for false patent marking pursuant to 35 U.S.C. §292. The Defendants object to the motion to amend asserting the amendment is untimely and futile.

II. DISCUSSION

A. Motion for Leave to Amend

Rule 15(a) of the Federal Rules of Civil Procedures provides that a party may amend the party's pleading "by leave of court or by written consent of the adverse party" and that "leave shall be freely given when justice so requires." In construing Rule 15(a), the Supreme Court has held that

> In the absence of any apparent or declared reason- such as undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, etc. - the leave sought should, as the rules require, be "freely given."

Foman v Davis, 371 U.S. 178, 182 (1962).

In the present case, Vanmoor seeks to amend his complaint to add a claim for false patent marking pursuant to 35 U.S.C. §292. Specifically, Vanmoor alleges that Sonoco's products contain patent numbers which have either expired or do not cover the products. Vanmoor seeks an injunction against the Defendant Sonoco and treble damages in the amount of $26,208,000.00 for the false marking, one-half to be paid to Vanmoor and one-half to be paid to the United States Treasury. Sec 35 U.S.C. §292(b).

The Defendants have responded that the motion to amend is untimely and the additional claim is without merit. Moreover, the Defendants argue that the additional claim only pertains to the Defendant Sonoco. Vanmoor responds that its delay in seeking to amend its false patent marking claim was due to his late discovery of the false marking and that he should be permitted to proceed with discovery on the claim.

At the outset, the Court notes that the motion to amend is untimely because the motion to amend was filed on July 17, 1998, more than two months after the deadline for amending his complaint. Moreover, while the Court agrees with Vanmoor that he only discovered the potential claim after the deadline for amending his complaint, the Court notes that the additional false patent marking claim are entirely independent from the claims asserted in Vanmoor's amended complaint. In order to establish a false patent marking claim, Vanmoor must establish, among other things, that Sonoco placed such alleged expired Patent numbers on its products "for the purpose of deceiving the public." Arcadia Machine & Tool, Inc., v. Strum, Ruger & Company, Inc., 786 F.2d 1124, 1125 (Fed Cir. 1986). As noted in Vanmoor's response, he would need additional discovery in order to establish his claim. However, the claims raised in the amended complaint are ripe and ready for adjudication. Accordingly, the Court will DENY Vanmoor's motion for leave to amend his complaint.

B. Summary Judgment Standard

The Court may grant summary judgement "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The stringent burden of

establishing the absence of a genuine issue of material fact lies with the moving party. Celotex Corp. v. Catrett, 477 U.S. 317, 323(1986). The Court should not grant summary judgement unless it is clear that a trial is unnecessary, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986), and any doubts in this regard should he resolved against the moving party, Adickes v. S.H.Kress & Co., 398 U.S. 144, 157(1970).

The movant "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 77 U.S. at 323. To discharge this burden, the movant must point out to the Court that there is an absence of evidence to support the nonmoving party's case. Id. at 325.

After the movant has met its burden under Rule 56(c), the burden of production shifts and the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). According to the plain language of Fed.R.Civ.P. 56(c), the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleadings," but instead must come forward with "specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(c); Matsushita, 475 U.S. at 587.

Essentially, so long as the non-moving party has had an ample opportunity to conduct discovery, it must come forward with affirmative evidence to support its claim. Anderson, 477 U.S. at 257. "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be a sufficient showing that the jury could reasonably find for that party." Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). If the evidence advanced by the

non-moving party "is merely colorable, or is not significantly probative, then summary judgement may be granted." Anderson, 477 U.S. 242, 249-50.

C. Prior Use

Section 102(b) of the Patent Act provides that no person is entitled to patent an "invention" that has been "in public use" or "on sale" in the United States more than one year before filing a patent application. 35 U.S.C. §102(b); Pfaff v. Wells Electronics, Inc., 119 S.Ct 304, 307 (1999). The date preceding the actual patent application filing by one year is commonly referred to as the "critical date." J.A. Laporte, Inc. v. Norfolk Dredging Co., 787 F.2d 1577, 1581 (Fed. Cir. 1986).

An invention is considered "in public use where there is any use of the claimed invention by a person other than the inventor who is under no limitation, restriction, or obligation of secrecy to the inventor. For purposes of defeating a patent application, a sale or public use prior to the critical date may be made by either the person applying for the patent or by a third party unrelated to the inventor. Baxter Int'l, Inc. v. Cobe Laboratories, Inc., 88 F.3d 1054, 1058 (Fed. Cir. 1996); J.A. Laporte, 787 F.2d at 1583. The party challenging validity must prove its case by clear and convincing evidence. Baxter Int'l, 88 F.3d at 1057. The determination of whether an invention was on sale or in public use prior to the critical date are questions of law. Baxter Int'l, 88 F.3d at 1058.

In the present case, Vanmoor filed his patent application on September 13, 1995. Therefore, if the invention at issue was in public use or on sale prior to the critical date, September 13, 1994, Vanmoor's patent is invalid.

The Defendants argue that Vanmoor's patent is invalid because Sonoco, the manufacturer of the products which allegedly infringe upon Vanmoor's patent, was already

manufacturing and selling these products with the same product specifications well before September 13, 1994. In support of their argument, the Defendants submitted affidavits with various supporting documentation, including photographs and documents showing the product specifications both prior to September 13, 1994 and at the time the allegedly infringing products were manufactured.

In response, Vanmoor argues that there is no proof of a single caulking cartridge sold to a consumer prior to the critical date of September 13, 1994. Vanmoor asserts that the Defendants have not submitted actual samples of the products as they existed in public use prior to the critical date. Vanmoor further alleges that the products at issue may have been modified sufficiently over time so that they did not infringe upon the patents prior to the critical date but did infringe upon the patent subsequent to the critical date. Finally, Vanmoor has submitted only one affidavit, from Kevin Paul Ross, a molds expert, who essentially states that the actual products manufactured from the Defendants' molds may have varied from the drawings. The expert concludes that the actual dimensions of the products can only be determined by micro-measurements of the products itself.

The Court finds that Vanmoor's response consists of mere conclusory allegations, which are insufficient to defeat a motion for summary judgment. Moreover, Vanmoor has failed to submit any evidence to raise a genuine issue of material fact that the subject products were not in public use and for sale prior to the critical date. Because the Court finds that the Defendants have established by clear and convincing evidence that the allegedly infringing products were for sale and in public use prior than the critical date of September 13, 1994, tile Defendants are entitled to summary judgement on the patent infringement claim.

D. Misappropriation of Trade Secrets

The Defendants, Federal and Sonoco, argue that they have not used or disclosed any information received from Vanmoor pursuant to confidentiality agreements entered into by the parties. In support of their argument, the Defendants note that the confidentiality agreements were entered into in October and November 1994, and the products at issue were manufactured with the same specifications as existed prior to October 1994. As with the patent infringement claims, Vanmoor has not presented any evidence to create a genuine issue of material fact as to the trade misappropriation claim, and Vanmoor's unsupported conclusory allegations are insufficient to establish any genuine issue of material fact. Therefore, the Defendants are entitled to summary judgement on the trade misappropriation claim.[1]

III. CONCLUSION

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Defendant's Motion for Summary Judgement [DE 70] is hereby **GRANTED** and Judgment is hereby entered in favor of the Defendants and against the Plaintiff, Arthur Vanmoor, and the Plaintiff shall take nothing from this action;

2. Plaintiff's Motion to Amend Complaint [DE 89] is hereby **DENIED**;

---

[1] Vanmoor also cites to Woodland Trust v. Flowertree Nursery Inc., 148 F.3d 1368 (Fed. Cir. (Fla.) 1998), wherein the court held that oral evidence of prior use, standing alone without corroboration, was not sufficient to invalidate a patent on the ground of prior knowledge and use under section 102(a). However, Woodland Trust is distinguishable from the present action because the affidavits in the present action in support of the Defendants' motion for summary judgement are corroborated by supporting documentation including drawings of the allegedly infringing products.

3. Plaintiff's Motion for Reference [DE 91] is hereby **DENIED**;

4. Plaintiff's Motion for Delayed Filing of Concise Statement of Facts as to which there is Material Issue to be Tried [DE 96] is hereby **GRANTED**;

5. Plaintiff's Motion to Reschedule Status Conference [DE 101] is hereby **DENIED**;

6. Plaintiff's Motion for Status Conference [DE 112] is hereby **DENIED**;

7. Plaintiff's Motion to Open Discovery [DE 116] is hereby **DENIED**;

8. All other pending motions are **DENIED** as moot; and

9. This case is closed.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 15th day of December, 1998.

WILLIAM P. DIMITROULEAS
United States District Judge

APPENDIX B[1]

ARTHUR VANMOOR,
Plaintiff-Appellant,
v.
WAL-MART STORES, INC., Defendant, and BUILDER'S SQUARE, INC., Defendant-Appellee, and HOME DEPOT USA, INC. (doing business as Home Depot) and RED DEVIL, INC., Defendants-Appellees, and SONOCO PRODUCTS COMPANY, Defendant-Appellee, and FEDERAL PACKAGING CORPORATION, Defendant-Appellee, and THE GLIDDEN COMPANY, Defendant-Appellee.

99-1190, 99-1256

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

January 10, 2000, Decided

Before MAYER, Chief Judge, ARCHER, Senior Circuit Judge, and RADER, Circuit Judge.

MAYER, Chief Judge.

Arthur Vanmoor appeals the judgment of the United States District Court for the Southern District of Florida, holding on summary judgment that United States Patent No. 5,582,331 is invalid under 35 U.S.C. § 102(b) and that Vanmoor's trade secrets had not been misappropriated. Vanmoor v. Wal-Mart, Inc., 1998 U.S. Dist. LEXIS 22694,

[1] Reprinted from Lexis-Nexis Database, with star pagination referring to 201 F.3d 1363 et seq.

Civ. Action No. 97-CIV-6907 (S.D.Fla. Dec. 15, 1998) (final judgment order).[2] Because we agree with the district court that Vanmoor has not raised a genuine issue as to any material fact and that Wal-Mart Stores, Inc. and its co-appellees are entitled to judgment as a matter of law, we affirm.

Background

Vanmoor is the owner of U.S. Patent No. 5,582,331, entitled "Caulking Gun and Cartridge with Afterflow Prevention" (" '331 patent"). The '331 patent is directed to a construction for a cartridge used to dispense caulking compound. The claims of the '331 patent recite a cartridge comprising a tubular body having a forward end with a dispensing opening and a movable backwall (commonly known as a plunger) disposed within the tubular body. The backwall is defined as having a diameter chosen such that it moves backwardly away from the forward end of the tubular body when the pressure within the chamber bounded by the tubular body, forward end, and backwall is greater than the pressure outside the chamber. The '331 patent **[*1365]** issued on December 10, 1996, from an application filed on September 13, 1995.

Vanmoor initially filed a complaint in the district court on July 28, 1997 alleging that major home improvement retailers, Wal-Mart Stores, Inc., Builder's Square, Inc., and Home Depot U.S.A., Inc., together with Red Devil, Inc., a leading manufacturer of caulking products, were infringing the '331 patent. As the supplier of several of the accused products to Wal-Mart, the Glidden Company was permitted to intervene as an additional defendant. Each of the

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[2] After the district court granted summary judgment, Vanmoor moved for recusal based on a search warrant issued by the district judge against Vanmoor in a different case when he was a state judge. Because his motion was untimely and is without merit, we will not address it further.

defendants (collectively "Wal-Mart") answered the complaint with a denial of all material allegations and interposed affirmative defenses that the '331 patent was invalid and unenforceable. Additionally, Wal-Mart asserted counterclaims, including a request for declaratory judgment that the '331 patent is invalid.

Vanmoor amended his complaint on April 22, 1998 to add two new defendants, Federal Packaging Corporation and Sonoco Products Company ("manufacturers"), the two major manufacturers in the United States of tubes and plungers used for caulking cartridges. Vanmoor added the manufacturers to the patent infringement claim and asserted a new trade secret misappropriation claim against them both. The manufacturers denied all material allegations and sought a declaratory judgment that the '331 patent is invalid.

Wal-Mart and the manufacturers jointly moved for summary judgment on both the patent infringement and trade secret misappropriation claims. They argued that the '331 patent is invalid as a matter of law because certain of the accused caulking cartridges were identical to cartridges manufactured, sold, and used prior to the critical date for the '331 patent. In addition, the manufacturers argued that they had received no disclosure of the alleged trade secrets before Vanmoor claimed those concepts had been incorporated into their products and that there was no change in the construction of the cartridges after they received the disclosure of Vanmoor's trade secrets. The motion was supported by affidavits from two Sonoco employees and documentary evidence showing that the manufacturing specifications, component dimensions, and methods of operation of at least three of the accused cartridges were identical to those manufactured, used, and sold prior to the critical date. Vanmoor responded by asserting that Wal-Mart and the manufacturers failed to prove the prior sale and public use of the allegedly infringing products and submitted a single affidavit from a molds expert who stated that the

actual products manufactured may have varied from the drawings.

The district court granted Wal-Mart's motion for summary judgment of invalidity, concluding that Vanmoor had not raised a genuine issue of material fact that the subject products were not on sale prior to the critical date and that the defendants had shown by clear and convincing evidence that they were for sale and in public use prior to the critical date. The district court also granted summary judgment that the manufacturers had not misappropriated Vanmoor's trade secrets based on Vanmoor's failure to present anything beyond conclusory allegations that the manufacturers had violated their confidentiality agreements with Vanmoor. This appeal followed.

Discussion

The issue is whether the district court erred in granting Wal-Mart's and the manufacturers' motion for summary judgment of invalidity and non-misappropriation of trade secrets. We review a district court's grant of summary judgment de novo. Petrolite Corp. v. Baker Hughes Inc., 96 F.3d 1423, 1425, 40 U.S.P.Q.2D (BNA) 1201, 1203 (Fed. Cir. 1996) (citing Meyers v. Asics Corp., 974 F.2d 1304, 1306, 24 U.S.P.Q.2D (BNA) 1036, 1037 (Fed. Cir. 1992)). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id. (citing Transmatic, Inc. v. Gulton Indus., Inc., 53 F.3d 1270, 1274, **[*1366]** 35 U.S.P.Q.2D (BNA) 1035, 1038 (Fed. Cir. 1995)).

On-Sale Bar

"The ultimate determination that a product was placed on sale under [35 U.S.C. § 102(b) (1994)] is a question of law, based on underlying facts." Ferag AG v. Quipp Inc., 45 F.3d 1562, 1566, 33 U.S.P.Q.2D (BNA) 1512, 1514-15 (Fed. Cir. 1995). Thus, this court reviews the ultimate determination without deference, but subsidiary fact findings, if there are

any, for clear error. See id. The Supreme Court recently clarified that a claimed invention is considered to be on sale within the meaning of Section 102(b) if, more than one year before the filing date to which the claim is entitled (the critical date), two conditions are satisfied. First, the product must be the subject of a commercial offer for sale. See Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 67, 119 S. Ct. 304, 311, 142 L. Ed. 2d 261 (1998). Second, the invention must be ready for patenting. See id., 119 S. Ct. at 312. The ready for patenting requirement represented a departure from our previously articulated "totality of the circumstances" test. See Weatherchem Corp. v. J.L. Clark, Inc., 163 F.3d 1326, 1333, 49 U.S.P.Q.2D (BNA) 1001, 1006 (Fed. Cir. 1998) (citing pre-Pfaff cases). One way to satisfy this newly articulated requirement is by proof of reduction to practice. See Pfaff, 525 U.S. at 67, 119 S. Ct. at 312.

Wal-Mart and the manufacturers argue and the district court held that the '331 patent is invalid because Wal-Mart placed the accused caulking cartridges on sale prior to the critical date. Vanmoor makes no argument that the pre-critical date sales were for a non-commercial purpose. He does, however, argue that summary judgment was inappropriate because Wal-Mart and the manufacturers did not meet their burden of proving by clear and convincing evidence that the cartridges that were the subject of the pre-critical date sales anticipated the claims of the '331 patent. This appeal does not come to us as a "typical case where the patentee has placed some device on sale prior to the critical date and the accused infringer must demonstrate that this device actually embodied or rendered obvious the patented invention." Evans Cooling Sys. Inc. v. General Motors Corp., 125 F.3d 1448, 1451, 44 U.S.P.Q.2D (BNA) 1037, 1039-40 (Fed. Cir. 1997). As was the case in Evans Cooling, the entire basis of the patent infringement claim is Vanmoor's (the patentee's) contention that the accused cartridges infringe the '331 patent. See id. Wal-Mart and the manufacturers denied that the accused cartridges infringe but

have, "by conceding infringement for purposes of the summary judgment motion and [their] on sale defense, properly pled in the alternative." Id. (citing Fed. R. Civ. P. 8(e) (1997)). Although Wal-Mart and the manufacturers bore the burden of proving that the cartridges that were the subject of the pre-critical date sales anticipated the '331 patent, that burden was satisfied by Vanmoor's allegation that the accused cartridges infringe the '331 patent. See id. (holding patent invalid under on-sale bar where accused product was offered for sale prior to the critical date of the patented invention).

Vanmoor also erroneously argues that the accused cartridges were not ready for patenting because no single piece of evidence presented at trial would enable a patent attorney to draft the '331 patent. This is not the test under Pfaff, which states that the ready for patenting "condition may be satisfied in at least two ways: by proof of reduction to practice before the critical date; or by proof that prior to the critical date the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention." 525 U.S. at 67-68, 119 S. Ct. at 312. Here the pre-critical date sales were of completed cartridges made to specifications that remain unchanged to the present day, showing that any invention embodied in the accused cartridges was reduced to practice before the critical **[*1367]** date. The Pfaff ready for patenting condition is also satisfied because the specification drawings, available prior to the critical date, were actually used to produce the accused cartridges. Because Wal-Mart and the manufacturers met their burden to prove both of the Pfaff conditions for application of the on-sale bar, we agree that the '331 patent is invalid under Section 102(b).

Trade Secret Misappropriation

The manufacturers argue that they have not used or disclosed any information received from Vanmoor pursuant

to confidentiality agreements they entered into with Vanmoor. Their argument is supported by documentary evidence that the confidentiality agreements were made in October and November 1994, and that the accused products have been manufactured to specifications that have remained unchanged since before October 1994. Vanmoor has proffered no evidence in support of his conclusory allegations of trade secret misappropriation and has thus failed to establish a genuine issue of material fact. The manufacturers are therefore entitled to judgment as a matter of law on the trade secret misappropriation claim.

Conclusion

Accordingly, the judgment of the United States District Court for the Southern District of Florida is affirmed.
AFFIRMED

APPENDIX C

ARTHUR VANMOOR, Plaintiff-Appellant,

v.

WAL-MART STORES, INC., Defendant, and BUILDER'S SQUARE, INC., Defendant-Appellee, and HOME DEPOT USA, INC. (doing business as Home Depot) and RED DEVIL, INC., Defendants-Appellees, and SONOCO PRODUCTS COMPANY, Defendant-Appellee, and FEDERAL PACKAGING CORPORATION, Defendant-Appellee, and THE GLIDDEN COMPANY, Defendant-Appellee.

99-1190, 99-1256

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

March 7, 2000, Decided

Before MAYER, Chief Judge, ARCHER, Senior Judge, and RADER, Circuit Judge.

ORDER

A petition for rehearing having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEES,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on March 14, 2000.

Dated: March 7, 2000

Supreme Court, U.S.
FILED
JUL 7 2000
CLERK

(2)

No. 99-1968

IN THE

Supreme Court of the United States

ARTHUR VANMOOR,

Petitioner,

v.

WAL-MART STORES, INC., BUILDER'S SQUARE, INC., HOME DEPOT USA, INC., (doing business as Home Depot), RED DEVIL, INC., SONOCO PRODUCTS COMPANY, FEDERAL PACKAGING CORPORATION, THE GLIDDEN COMPANY,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents Wal-Mart Stores, Inc., Builder's Square, Inc., Home Depot USA, Inc., Red Devil, Inc., Sonoco Products Company, Federal Packaging Corporation and The Glidden Company (hereinafter "Respondents") object to Petitioner Vanmoor's statement of the Questions Presented For Review as being incomplete and for raising one question (Question No. 2) for the first time in this proceeding. In order to clarify the issues, the Respondents have taken the Petitioner's statement of Question Nos. 1 and 3 and added the missing factual predicate (shown in italics below). Question No. 2 is improperly raised at this point in the proceeding and should be disregarded.

1. When the defendant in a patent infringement case claims prior use and sale that would invalidate the patent, *and does so based upon its own prior use and sale of the very products that the plaintiff has accused of infringing every claim of the patent in suit,* does the plaintiff's allegation of current infringement satisfy the defendant's burden of proving that the products that were the subject of the pre-critical date sales anticipated the claimed invention?

2. [omitted].

3. Where Section 282 of the Patent Statutes states that "each claim of a patent . . . shall be presumed valid independently of the validity of other claims," *but where the defendant has shown with undisputed evidence that the products accused by the plaintiff of infringing every claim of the patent in suit have been sold by the defendant since before the critical date of the patent,* can the court summarily declare *the claims of the patent invalid without addressing in its order each of the specific claims of the patent?*

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF THE CASE	2
A. The District Court Proceedings	2
B. The Appellate Proceedings	6
SUMMARY OF ARGUMENT	7
REASONS FOR DENYING VANMOOR'S PETITION	8
A. The District Court and The Federal Circuit Correctly and Properly Applied Rule 56, FED.R.CIV.P., and The Controlling Precedent	8
B. VanMoor's Real Quarrel Is With Established Law, Not With The Decision of The Federal Circuit in This Case	10
CONCLUSION	12

TABLE OF AUTHORITIES

FEDERAL CASES

	Page
Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970)	9
Anderson v. Liberty Lobby, Inc., 477 U.S. 225 (1986)	8, 9
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	8
Electric Storage Battery Co. v. Shimadzu, 307 U.S. 5 (1939)	10
Evans Cooling Sys. Inc. v. General Motors Corp., 125 F.3d 1448 (Fed. Cir. 1997) *cert. denied*, 118 S.Ct. 1050 (1998)	4, 6, 10, 11
Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)	8
Peters v. Active Mfg. Co., 129 U.S. 530 (1889)	8
Pfaff v. Wells Elec. Inc., 525 U.S. 55 (1999)	5, 6, 9, 10
Polaroid Corp. v. Eastman Kodak Co., 789 F.2d 1556 (Fed. Cir. 1986)	8, 10

STATUTES

35 U.S.C. § 102(b)	2, 4, 9, 10
Fed. R. Civ. P. 56(c)	9

OTHER AUTHORITIES

Sup. Ct. R. 10	8

IN THE

Supreme Court of the United States

No. 99-1968

ARTHUR VANMOOR,

Petitioner,

v.

WAL-MART STORES, INC., BUILDER'S SQUARE, INC., HOME DEPOT USA, INC., (doing business as Home Depot), RED DEVIL, INC., SONOCO PRODUCTS COMPANY, FEDERAL PACKAGING CORPORATION, THE GLIDDEN COMPANY,

Respondents.

On Petition for a Writ of Certiorari To the United States Court of Appeals For the Federal Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Wal-Mart Stores, Inc., Builder's Square, Inc., Home Depot USA, Inc., Red Devil, Inc., Sonoco Products Company, Federal Packaging Corporation and The Glidden Company (collectively "Respondents"[1]) respectfully oppose Petitioner Arthur Vanmoor's ("Vanmoor's") Petition for a

[1] Pursuant to this Court's Rule 29.6, Respondent Federal Packaging Corporation is a wholly-owned subsidiary of Caraustar Industries, Inc., which is publicly traded; and Respondent The Glidden Company is affiliated with ICI Chemical Industries PLC, which is publicly traded. All other Respondents are unaffiliated companies.

Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

Respondents concur in Vanmoor's identification of the opinions of the District Court and the Federal Circuit that underlie his Petition.

STATEMENT OF THE CASE

The issue before the Court is whether there are "compelling reasons" for the Court to review the Federal Circuit's January 10, 2000 decision in this matter. Specifically, the questions raised by the Petition focus on whether the Federal Circuit correctly and properly applied procedural and substantive law in affirming the District Court's Order granting Respondents' motion for summary judgment that all six (6) claims of Vanmoor's U.S. Patent No. 5,582,331 ("the '331 patent") are invalid under 35 U.S.C. § 102(b). As shown below, Vanmoor's Petition is unsupported by fact or law and should be denied.

A. The District Court Proceedings

As remains pertinent to Vanmoor's Petition, this is a patent infringement case wherein Vanmoor has sued the Respondents for infringement of every claim of the '331 patent. Each of the Respondents responded to Vanmoor's allegations by denying infringement and raising certain affirmative defenses and/or counterclaims, including the defense and counterclaim that the '331 patent was invalid under the "on-sale" and "public use" bars of 35 U.S.C. § 102(b). During the pre-trial phase of the case, the Respondents joined in filing a motion for summary judgment seeking a determination by the District Court that the '331 patent was invalid as a matter of law because certain of the caulking cartridge products that had been accused of

infringement were identical to cartridges manufactured, sold and used publicly since well before the "critical date" of the '331 patent, September 13, 1994.

A detailed explanation of the subject matter of the '331 patent is not necessary to the Court's disposition of Vanmoor's Petition. Suffice it to say here that the '331 patent is directed to products that consist of a cylindrical cartridge tube with a dispensing spout at one end and a moveable backwall or plunger positioned within the tube at the other end. In operation, the plunger is pushed into the tube by the ram or actuator of the caulking gun, causing caulking compound or other material contained within the tube to be dispensed through the spout. The '331 patent includes six (6) claims; claims 1, 5 and 6 of which are independent; claims 2-4 of which depend from claim 1.

The alleged invention claimed by the '331 patent resides in part in providing a space between the outer diameter of the plunger and the inner diameter of the tube so that the plunger will move away from the spout in response to built-up pressure within the tube when the pushing force on the plunger is released. This rearward movement of the plunger solves an alleged problem called "after flow," *i.e.* the unwanted dispensation of the tube contents from the spout after the pushing force is released.

Vanmoor's infringement allegations are directed at eight caulking cartridges, three of which, Defendants' Deposition Exhibits 16, 19 and 20, were the subjects of Respondents' motion for summary judgment. Respondents' motion for summary judgment was supported by the affidavits of two employees of Respondent Sonoco Products Company, Mr. Daniel Abernathy and Mr. Kent Lefebvre. As set forth in their respective affidavits, Messrs. Abernathy and Lefebvre were able to determine from telltale manufacturing artifacts shown in photographs of the actual accused cartridges (Defendants' Deposition Exhibits 16, 19 and 20) that the

particular tubes and plungers of these accused products were manufactured to the same specifications as had been used by Sonoco for these products since well before the September 1994 critical date of the '331 patent. The affidavits of Messrs. Abernathy and Lefebvre were corroborated by dated business records of Sonoco, including the pertinent manufacturing specifications. Further, during his deposition, Mr. Lefebvre testified regarding certain invoices and shipping documents related to Sonoco products sold before the critical date of the '331 patent, which products were sold in volume and manufactured to the same diameter specifications (for both plungers and tubes) that were still in place at the time of his affidavit.

Respondents' motion for summary judgment conclusively demonstrated that certain of the products specifically accused by Vanmoor of infringing all six claims of his '331 patent were of prior art construction, and thus clearly presented a *prima facie* case that all six claims of the '331 patent were invalid under 35 U.S.C. § 102(b). It was therefore incumbent on Vanmoor to come forward with competent proof that raised a genuine issue of material fact for trial.

As the District Court properly concluded, Vanmoor did not satisfy this burden. Indeed, even though he was afforded all requested discovery, Vanmoor failed to produce any evidence whatsoever showing or suggesting that changes were made to the prior art cartridges after the critical date. Instead, Vanmoor produced the affidavit of an alleged molds expert who testified only that one *could* change the dimensions of the cartridge components *if one wanted to do so.* As a result, the record stands uncontroverted that the cartridge components accused by Vanmoor of infringing the '331 patent have remained unchanged since well before the critical date of Vanmoor's patent.

For these reasons, and in accordance with the Federal Circuit's decision on like facts in *Evans Cooling Sys. Inc. v.*

General Motors Corp., 125 F.3d 1448 (Fed. Cir. 1997) *cert. denied*, 118 S.Ct. 1050 (1998), and this Court's decision in *Pfaff v. Wells Electronics, Inc.*, 525 U.S. 55 (1999), the District Court properly held that the accused cartridges were prior art products that rendered the claims of the '331 patent invalid as a matter of law. Specifically, the District Court acknowledged the single affidavit submitted by Vanmoor in response to Respondents' motion stating:

> . . . Vanmoor has submitted only one affidavit, from Kevin Paul Ross, a molds expert, who essentially states that the actual products manufactured from the [Respondents'] molds may have varied from the drawings. The expert concludes that the actual dimensions of the products can only be determined by micro-measurements of the products itself [sic].
>
> The Court finds that Vanmoor's response consists of mere conclusory allegations, which are insufficient to defeat a motion for summary judgment. Moreover, Vanmoor has failed to submit any evidence to raise a genuine issue of material fact that the subject products were not in public use and for sale prior to the critical date. Because the Court finds that the [Respondents] have established by clear and convincing evidence that the allegedly infringing products were for sale and in public use prior than the critical date of September 13, 1994, the [Respondents] are entitled to summary judgment on the patent infringement claim.

(Pet. App. p. 7a).

Of particular note, nowhere before the District Court did Vanmoor argue in response to Respondents' motion that this Court's decision in *Pfaff* was inapplicable because the prior art on which Respondents' motion was based originated with the Respondents rather than the inventor of the '331 patent. That is, Question No. 2 of Vanmoor's Petition to this Court was not raised before the District Court.

B. The Appellate Proceedings

The Federal Circuit considered each of Vanmoor's allegations of error and unanimously held, after a *de novo* review of the record, that "[b]ecause we agree with the district court that Vanmoor has not raised a genuine issue as to any material fact, and that [the Respondents] are entitled to judgment as a matter of law, we affirm." (Pet. App. at 11a). In doing so, the Federal Circuit expressly acknowledged and rejected Vanmoor's arguments, expressed as Question Nos. 1 and 3 in his Petition, that the Respondents did not meet their burden of proving by clear and convincing evidence that the cartridges that were the subject of pre-critical date sales anticipated each of the claims of the '331 patent. (Pet. App. at 14a). Specifically, the Federal Circuit stated:

> ...This appeal does not come to us as a "typical case where the patentee has placed some device on sale prior to the critical date and the accused infringer must demonstrate that this device actually embodied or rendered obvious the patented invention." *Evans Cooling Sys. Inc. v. General Motors Corp.*, 125 F.3d 1448, 1451, 44 U.S.P.Q.2d (BNA) 1037, 1039-40 (Fed. Cir. 1997). As was the case in *Evans Cooling*, the entire basis of the patent infringement claim is Vanmoor's (the patentee's) contention that the accused cartridges infringe the '331 patent. *See id.* [Respondents] denied that the accused cartridges infringe but have, "by conceding infringement for purposes of the summary judgment motion and [their] on sale defense, properly pled in the alternative." *Id.* (citing Fed. R. Civ. P. 8(3)(1997)). Although [Respondents] bore the burden of proving that the cartridges that were the subject of the pre-critical date sales anticipated the '331 patent, that burden was satisfied by Vanmoor's allegation that the accused cartridges infringe the '331 patent. *See id.* (holding patent invalid under on-sale bar where accused

product was offered for sale prior to the critical date of the patented invention).

(Pet. App. at 14a-15a).

As before the District Court, Vanmoor omitted to raise the issue denominated in his Petition as Question No. 2 before the Federal Circuit.

On March 7, 2000, the Federal Circuit denied Vanmoor's Petition for Rehearing and Suggestion for Rehearing *En Banc*. (Pet. App. at 17a).

SUMMARY OF ARGUMENT

Vanmoor's Petition, like his arguments before the District Court and the Federal Circuit, overlooks the legal implications of his allegation that the cartridge products that are the subject of Respondents' motion for summary judgment infringe each of the claims of the '331 patent. That allegation, which is steadfastly maintained by Vanmoor, plus the undisputed proof filed in support of Respondents' motion that the accused products had been on sale and in public use since well before the critical date of the '331 patent, dooms Vanmoor's legal position in this proceeding. Vanmoor has committed the gross error of judicially admitting that the undisputed prior art is covered by the claims of his patent. Recognizing this fatal error, the District Court and the Federal Circuit rendered the only judgment legally proper under the circumstances. The '331 patent is invalid.

In his Petition, Vanmoor has tried to do that which legally he cannot do. He seeks to turn contradictory legal arguments into genuine issues of material fact in order to gain review by this Court of established precedent for which review has previously been denied. Further, he seeks to raise belatedly an issue that was not raised in the courts below.

There is nothing improper or surprising about a legal result that a patent is invalid where its owner asserts an

infringement claim against that which is undisputedly in the prior art. The old patent law axiom that "that which infringes, if later, would anticipate, if earlier" is precisely for such a circumstance. *See Polaroid Corp. v. Eastman Kodak Co.*, 789 F.2d 1556, 1573 (Fed. Cir. 1986) (*citing Peters v. Active Mfg. Co.*, 129 U.S. 530, 537 (1889)).

Because Vanmoor failed to carry his burden of coming forward with competent evidence that raises any genuine issue of material fact and because on the record before the Court the Respondents are entitled to judgment as a matter of law, summary judgment against Vanmoor was and is clearly appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87 (1986).

REASONS FOR DENYING VANMOOR'S PETITION

This Petition arises out of an unremarkable grant of summary judgment which, after *de novo* review, was unanimously affirmed by the Federal Circuit in a well-reasoned opinion. As shown herein, Vanmoor simply failed to carry his burden in responding to Respondents' fully-supported motion for summary judgment. Nothing about this case presents "compelling reasons" why the Federal Circuit's decision should be reversed. *See* Rule 10, Sup.Ct.R. To the contrary, given the clear record below, Vanmoor's Petition raises only an allegation that "properly stated rule[s] of law" have been misapplied. *Id.*

A. The District Court and The Federal Circuit Correctly and Properly Applied Rule 56, FED.R.CIV.P., and The Controlling Precedent

As indicated by the above-quoted portions of the Federal Circuit's decision and a review of the District Court's well-

reasoned decision, both lower courts correctly and properly applied Rule 56(c), Fed.R.Civ.P., and the controlling precedent of this Court in disposing of Respondents' motion for summary judgment. Contrary to the suggestions of Vanmoor's Petition, neither lower court inappropriately failed to hold the Respondents' to their burden of proving that each claim of the '331 patent was invalid based on clear and convincing evidence. Rather, both courts recited and followed this Court's controlling authority on how properly to dispose of a motion for summary judgment. Both courts considered the evidence of record in a light most favorable to Vanmoor, the non-moving party, and drew all reasonable inferences in his favor. *See Anderson,* 477 U.S. at 225 (*citing Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 158-59 (1970)). Similarly, both courts referred to and followed this Court's decision in *Pfaff,* which detailed the applicable substantive patent statute, *i.e.* 35 U.S.C. § 102(b).

In particular, the Federal Circuit properly disposed of Vanmoor's allegation that the Respondents had failed to prove that their prior art products satisfied the limitations of the six claims of the '331 patent, by making reference to Vanmoor's allegation (which he maintained in his brief to the Federal Circuit) that the products upon which Respondents' motion was based, infringed all of the claims of his patent. The Court also referred to the Respondents' admission of infringement for the purpose of their motion. In so doing, the Federal Circuit followed its own established precedent to correctly answer Question Nos. 1 and 3 herein.

Vanmoor's Petition simply seeks to have matters both ways. He seeks a result whereby the accused cartridges fall within his patent claims for infringement purposes, but where these same cartridges (or exact prior art duplicates thereof) fall outside of his claims for invalidity purposes. This, the courts below could not properly do, as both courts recognized and held. Again, "that which infringes, if later, would

anticipate, if earlier." *Polaroid*, 789 F.2d at 1573. Vanmoor's arguments to the contrary have not gained strength through repetition; Vanmoor had his "day in court" and lost.

Vanmoor fairs no better on his improper Question No. 2 than he does on Question Nos. 1 and 3. Question No. 2 seeks to have this Court create an exception to the "on-sale" bar as applied in this Court's decision in *Pfaff*. 525 U.S. 55. The problem with Vanmoor's plea is twofold. First, Question No. 2 was nowhere raised by Vanmoor in the courts below, which is reason enough alone not to consider it now.

Second, Vanmoor's position that 35 U.S.C. § 102(b) applies only with respect to prior sales or uses originating with the patentee/inventor, finds no support in the governing statute or in the case law. In fact, the law is clearly to the contrary. In *Electric Storage Battery Co. v. Shimadzu*, this Court held that two patents owned by Shimadzu were invalid under the predecessor to 35 U.S.C. § 102(b) based upon the public use, *by the defendant*, of the very apparatus and process accused by the patentee of infringement. 307 U.S. 5, 17-18 (1939). The facts in the *Electric Storage Battery* case are in all material respects the same as those of this case. Vanmoor is simply grasping for straws that do not exist.

B. VanMoor's Real Quarrel Is With Established Law, Not With The Decision of The Federal Circuit in This Case

In reality, Vanmoor's Question Nos. 1 and 3 seek review of the precedent set forth in the Federal Circuit's decision in *Evans Cooling Sys. Inc. v. General Motors Corp.*, 125 F.3d at 1451, not its decision in this case. In *Evans Cooling*, as in this case, the patentee accused the defendant of infringing his patent for making and selling an accused product that turned out to be within the prior art. In disposing of that case, the Federal Circuit stated:

> ...This is not the typical case where the patentee has placed some device on sale prior to the critical date and the accused infringer must demonstrate that this device actually embodied or rendered obvious the patented invention. Here, the entire basis of the lawsuit is Evans'—the patentee's—contention that the LT1 engine—the device that was put on sale—contains a cooling system that infringes. GM denied that the LT1 engine infringed the '636 patent but, by conceding infringement for purposes of the summary judgment motion and its on sale defense, properly pled in the alternative. *See* Fed. R. Civ. P. 8(e) (1997) ("A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses.") Although GM bore the burden of proving that the LT1 engine embodied the patented invention or rendered it obvious for purposes of the summary judgment motion, this burden is met by Evans' allegation, forming the sole basis for the complaint, that the LT1 engine infringes. Indeed, even on appeal, Evans states in its brief, directed only to the on sale issue, that "GM uses an aqueous reverse flow cooling system in its LT1 engine."

Id. at 1451.

Thus, in deciding this case, the Federal Circuit did nothing novel; its decision comports completely with precedent for which review by this Court has previously been denied. 118 S.Ct. 1050 (1998). Nothing about this unremarkable case warrants the expense of this Court's resources.

CONCLUSION

For all the foregoing reasons, Vanmoor's Petition should be denied.

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Supreme Court, U.S.
FILED
JUL 21 2000
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99-01968

IN THE

SUPREME COURT OF THE UNITED STATES

ARTHUR VANMOOR,

Petitioner

v.

WAL-MART STORES, INC., ET AL.

Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Arthur Vanmoor files this reply to address certain new points raised in petitioners' brief in opposition.

The "Undisputed Proof" is in Fact Disputed

Respondents falsely state that their proof of prior use of the patented invention is "undisputed." Respondents' Brief, p. 7. This is clearly incorrect. The respondents' claim that no changes were made from prior to the critical date of the patent to the present, lies at the heart of this case and it is indeed disputed. Petitioner's request to be heard in this Court is founded on the lack of such proof in the district court and on the gross error in the appeals court to not review the Respondents' prior art drawings. Instead, the appeals court only relied on the affidavits by two interested persons according to which no changes had been made since prior to the critical date of Petitioner's patent. Had the appeals court reviewed the underlying documentation, of course, the affidavits upon which summary judgment was granted would have been found to be directly at odds with the written documentation. The affidavits must necessarily be false

since, as shown by the specification sheets, Respondents changed their product after the invention was disclosed to them by Petitioner. The content of the affidavits filed by Respondents in the district court is certainly not undisputed. It has been disputed from the outset.

The products made according to the prior art drawings, of course, cannot infringe the patent claims. The current products infringe. If, arguendo, Respondents never changed their specifications, they would not infringe and there would be no need to have Petitioner's patent declared invalid.

Respondents Prove Their Case With Duplicates

Respondents admonish Petitioner for seeking "to have matters both ways," by claiming infringement and at the same time trying to avoid their prior art. *Respondents' Brief*, p. 9. That argument is hollow at best. Petitioner claims that the current products infringe some of the patent claims while the prior art products do not. Where the prior art products did not infringe, they could also not anticipate the claimed invention. It is because Respondents changed their product that Petitioner can have it both ways.

The Questions Presented

Question No. 2 is raised for the first time in this petition because the Court of Appeals for the Federal Circuit, for the first time, founded its decision on the *ready for patenting* test of *Pfaff v. Wells Electronics*, 525 U.S. 55 (1998). The district court only fleetingly referred to *Pfaff* in support of its fundamental definition of the statutory terms "on sale" and "in public use." The district court decision was not founded on the *ready for patenting* test of *Pfaff*. Where an issue is discussed and decided for the first time by the appeals court, such issue is eminently appealable to this Court.

Further, respondents cite to *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5 (1939), and allege that the facts of

that case "are in all material respects the same as those of this case." Respondents' Brief in Opposition, p. 10. The respondents' reliance on *Electric Storage Battery* is strange indeed. That case was decided in 1939, before the Patent Act of 1952, which made very considerable amendments to the section dealing with the public use and on sale doctrines. There, the question was whether and to what extent a patentee could rely on acts in Japan to swear behind a date of first use in this country by the alleged infringer. This is entirely unrelated to the case at hand. Also, the use of the invention by the defendants in *Electric Storage Battery* was "without knowledge of [the patentee's] inventions." *Id.* at 9. Here, of course Sonoco became fully aware of Vanmoor's invention shortly after Vanmoor had filed his priority application, when Vanmoor presented his invention to Sonoco in late 1994.

PETITIONER SHOULD BE GIVEN HIS DAY IN COURT

Summary judgment in the court below was granted on affidavits which were fraudulent and the contents of the Respondents' prior art drawings were not properly appreciated. Petitioner is asking for his day in court so that the trial court may inspect the prior art drawings and compare the same with the infringing, i.e., changed, products. The petition for a writ of certiorari should be granted.

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